Office - Supreme Court, U.S.
FILED
FEB 9 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SATELLITE TELEVISION & ASSOCIATED RESOURCES, INC.

Petitioner,

v.

CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

DUDLEY H. CHAPMAN
1711 N Street, N.W.
Washington, D.C. 20036
(202) 331-8160
Counsel of Record

KEITH I. CLEARWATERS
1711 N Street, N.W.
Washington, D.C. 20036
Counsel for Petitioner

PATRICK M. MCSWEENEY
JACK W. BURTCH, JR.
MCSWEENEY, STUTTS & BURTCH
9 South 12th Street
Richmond, VA 23219
Counsel for Petitioner

February 9, 1984

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
1. The Respondents' Brief In Opposition Goes Outside The Opinions Below To Construct Factual Issues Not Addressed By Either Court	1
2. The Issues Presented Are Exclusively Questions Of Law	2
3. Respondents' Contention That Exclusivity Agreements Have Never Been Held By This Court Per Se Unlawful Is In Error	2
4. Respondents' Contentions Concerning The Relevant Market Have No Application Where The Offense Charged Is Tying Or Leveraging A Strategic Position	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

Bales v. *Kansas City Star Company*, 336 F.2d 439 (8th Cir. 1964) 4

Blanton v. *Mobil Oil Corp.*, 1984-1 Trade Cas. (CCH) ¶ 65,765 at 67,143 - 67,144 (9th Cir. 1983) 7

Bravman v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 101 (3rd Cir.), *cert. denied*, 434 U.S. 823 (1977) 3

Brown Shoe Co. v. *United States*, 370 U.S. 294, 325 (1962) 5

Fashion Originators' Guild of America, Inc. v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941) 3

Goldman Theatres, Inc. v. *Loew's, Inc.*, 150 F.2d 738, 744 (3d Cir. 1945) 6

International Business Machines Corp. v. *United States*, 298 U.S. 131 (1936) 3

International Salt Co., Inc. v. *United States*, 332 U.S. 392 (1947) 3

Lessig v. *Tidewater Oil Co.*, 327 F.2d 459, 474-5 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) 7

Osborn v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1961) 4

Northern Pacific Railway Co. v. *United States*, 356 U.S. 1 (1958) 3

Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 6

Standard Oil Co. of California and Standard Statems, Inc. v. *United States*, 337 U.S. 293, 307 (1949) ... 4

Susser v. *Cavel Corp.*, 332 F.2d 505, 511 (2d Cir. 1964) 4

Tampa Electric Co. v. *Nashville Coal Co.*, 365 U.S. 320 (1961) 3

Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594, 611 (1953) 6

United States v. *Crescent Amusement Co.*, 323 U.S. 173 (1944) 6

United States v. *E.I. DuPont De Nemours & Co.*, 351 U.S. 377, 365 (1956) 6, 7

Table of Authorities Continued

	Page
United States v. *Griffith*, 334 U.S. 100 (1948)	6
United States v. *Grinnel Corporation*, 384 U.S. 563 (1966)	6
United States v. *Loew's, Inc.*, 371 U.S. 38 (1962)	3
Warriner Hermetics, Inc. v. *Copeland Refrigeration Corp.*, 463 F.2d 1002, 1011 (5th Cir. 1972)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1033

SATELLITE TELEVISION & ASSOCIATED RESOURCES, INC.

Petitioner,

v.

CONTINENTAL CABLEVISION OF VIRGINIA, INC., *et al.*,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

ARGUMENT

1. The Respondents' Brief In Opposition Goes Outside The Opinions Below To Construct Factual Issues Not Addressed By Either Court

Respondents' brief in opposition asserts a number of alleged factual justifications for its exclusivity provision and asserts that these issues were decided by the courts below. Neither court, however, addressed the kind of factual arguments advanced by Respondents, both courts taking as a *given* that because of Defendants' unilateral refusal to install their system without exclusivity, that that provision had the beneficial effect of bringing Defendants' cable system into the apartments. The decision

below, by accepting the fact of Continental's refusal to install as a justification begs the question of whether such a refusal was permissible under the antitrust laws. The two sentence extract quoted from the District Court opinion on page 7 of Respondents' brief is the *total* consideration given by that court to the reasonableness of Defendants' contracts, and the Court of Appeals accepted that conclusion without question. (Petition, p. 11a). The question thus presented by this conclusion is one of law: Is it proper for the trial court to accept at face value as a justification for foreclosing competition under the Rule of Reason the unilateral declaration of one party that it will not participate unless competition is excluded, without inquiring into the reasonableness or justification for that position? By answering that question in the affirmative the courts below have, Petitioner contends, stretched the Rule of Reason far beyond the boundaries heretofore permitted by this court.

2. The Issues Presented Are Exclusively Questions Of Law

The case having been submitted on cross motions for summary judgment, it was the position of both parties, unquestioned by either of the courts below, that there were no material issues of fact. The lower courts' conclusions both as to the reasonableness of Defendants' exclusivity provisions, and as to the proper definition of a relevant market, including the extent to which that definition was relevant, were rulings of law and they were erroneous.

3. Respondents' Contention That Exclusivity Agreements Have Never Been Held By This Court Per Se Unlawful Is In Error

Respondents quote a statement by the Third Circuit that "Neither an exclusive dealing agreement nor a ter-

ritorial sales solicitation requirement has ever been held by the Supreme Court to be a *per se* violation of the antitrust laws." *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 101 (3rd Cir.), *cert. denied*, 434 U.S. 823 (1977). Exclusive dealing arrangements, however, have repeatedly been held unlawful where, as here, they are imposed through tying or leveraging a strategic advantage. The tying agreements struck down by this Court in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958) (limited exclusive transportation contracts); *International Salt Co., Inc.* v. *United States*, 332 U.S. 392 (1947) (exclusive supply of salt tablets); and *International Business Machines Corp.* v. *United States*, 298 U.S. 131 (1936) (exclusive supply of punch cards, were all exclusive dealing as well as tying contracts. Exclusive dealing was also one of the elements of illegality found by this court in *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457, 465 (1941).

Respondents' legal proposition that there is such a thing as a definable category of contracts labeled "exclusive dealing contracts" that are governed by a single rule is mistaken. The concepts of "tying" and "exclusive dealing," while distinct, are not mutually exclusive as Respondents contend. Some tying contracts have no element of exclusive dealing, such as those in *United States* v. *Loew's, Inc.*, 371 U.S. 38 (1962) (diverse motion pictures leased as a package containing several different films), and some exclusive dealing agreements have no element of tying, such as *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (requirements contract for coal). But the contracts in *Northern Pacific*, *International Salt* and *IBM* were at the same time tying and exclusive dealing agreements. Section 3 of the Clayton Act condemns both tying and exclusive dealing

agreements with the identical language, making no distinction between them. Indeed, the presence or absence of tying is a consistent factor in distinguishing legal, from illegal exclusive dealing arrangements: *Cf. Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1961) (gasoline retailers exclusive arrangements with TBA manufacturers held illegal tying, the court noting that the arrangement served to exploit a bottleneck position of the retailer); *Susser* v. *Cavel Corp.*, 332 F.2d 505, 511 (2d Cir. 1964) (majority and dissent differed over whether the exclusive dealing contract was also a tying contract, but neither considered the categories mutually exclusive); *Warriner Hermetics, Inc.* v. *Copeland Refrigeration Corp.*, 463 F.2d 1002, 1011 (5th Cir. 1972) (per se instruction required in exclusive dealing case); *Bales* v. *Kansas City Star Company*, 336 F.2d 439 (8th Cir. 1964) (exclusive dealing agreement between newspaper and independent distributors held to violate both Sherman 1 and Clayton 3). One of the key factors that serves to distinguish legal exclusive dealing from illegal exclusive dealing or tying arrangements is the existence of some mutual advantage in the exclusivity itself. See, e.g., *Standard Oil Co. of California and Standard Statems, Inc.* v. *United States*, 337 U.S. 293, 307 (1949) (Dictum noting that a characteristic distinction between the pure types of tying and exclusive dealing agreements is that in the latter the exclusivity provision works to the mutual advantage of both parties). The exclusive railroad transportation agreement in *Northern Pacific* on the other hand, this Court pointed out, contained no advantage for the farmer in the exclusivity feature itself. Here, too, the apartment owner gains no advantage from the exclusivity feature, and is in fact disadvantaged, as the owners themselves protested. (Petition, p. 4 n.1).

Even in the absence of tying, exclusivity imposed through leveraging market power was held to constitute a Section 2 violation as pointed out in our original Petition. (Page 9, note 9).

Thus, on the present facts, two grounds of illegality are present, either one of which is sufficient to nullify the legal proposition asserted by Respondents. Moreover, the question need not necessarily be viewed as one of per se illegality. All of the factors cited above make clear that exclusivity as used here had no purpose other than to foreclose competition which is sufficient to make it unlawful under the Rule of Reason.

4. Respondents' Contentions Concerning The Relevant Market Have No Application Where The Offense Charged Is Tying Or Leveraging A Strategic Position

The Respondents' contentions concerning the relevant market are in error at two levels. First, because the District Court's decision was based upon an improper legal standard, and second, because a relevant market determination is not essential to either a finding of per se violation of Section 1, or attempts to monopolize under Section 2, both of which are violations asserted by Petitioner.

First, the District Court applied an improper legal standard, expressly rejecting one of the criteria enumerated by this Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962) which pointed out that within the broad relevant market "well-defined submarkets may exist, which in themselves, constitute product markets for antitrust purposes." The Court of Appeals ignored this ruling, asserting in a footnote that "The use of the term 'submarket' is to be avoided; it adds only confusion to an already imprecise and complex endeavor." (Petition, p. 7a, note 5) And we have already noted in our

Petition the clear conflict between the 4th Circuit's use of the relevant market concept in this case with that of the Third Circuit in *Goldman Theatres* (Petition p. 19, n. 10). But we have not stressed this error in our Petition because although the criteria of *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966) are easily met on the facts of this case given a proper definition of the relevant market, it is unnecessary to contest that issue when violations of law can be shown without such a definition.

Thus the second error in Respondent's arguent overlooks the fact that the definition of a relevant market in the *Grinnell* or *Du Pont* sense is not controlling where an attempt to monopolize in violation of Section 2 is alleged, because Section 2 forbids such behavior with respect to "any part" of commerce. This exception has been recognized repeatedly by this Court. *United States* v. *E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 365 (1956) in n.23 on page 365 cited a whole list of precedents falling outside the relevant market concept applied in that case. This Court has repeatedly affirmed that exception, as stated in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953):

> "The 'market', as most concepts in law or economics, cannot be measured by metes and bounds. Nor does the substance of Sherman Act violations typically depend on so flexible a guide. Section 2 outlaws monopolization of any 'appreciable part' of the interstate commerce . . ."

This same rule was the basis for this Court's decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), and other cases cited in note 10 on page 10 of our petition.

In addition to the section 2 exception, a relevant market does not have to be defined when a per se violation is alleged, and the tying charge supplies that element here. These dual exceptions were the basis of the decision in the recent case of *Blanton* v. *Mobil Oil Corp.*, 1984-1 Trade Cas. (CCH) ¶ 65,765 at pp. 67,143 - 67,144 (9th Cir. 1983) cited on page 9 of Respondents' brief, which stands not at all for the proposition they assert, but for the opposite contention of Petitioner. That opinion, at page 67,143, quotes from its earlier decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 474-5 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) as follows:

> "When the charge is attempt (or conspiracy) to monopolize, rather than monolization,, the relevant market is 'not in issue.' *United States* v. *E.I. Du Pont & Co.*, 351 U.S. 377, 395 n.23, 76 S.Ct. 994, 100 L.Ed. 1264 (1965). Section 2 prohibits attempts to monopolize 'any part' of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products."

In *Blanton* the court sustained a jury finding of a Section 2 violation regardless of a proper finding on the relevant market because a per se violation was proved. The fact that Continental's conduct was intentional and exclusionary, and directed specifically at Plaintiff is undisputable on the basis of its own admissions and the protest of the Richmond Apartment Council (Petition pp. 9, 12, and 4 (note 1)).

CONCLUSION

The inability of Respondents to cite any relevant authority for the legal position taken by the courts below demonstrates how far those opinions depart from the decisions of this Court and other Circuits.

Respectfully submitted,

SATELITE TELEVISION & ASSOCIATED RESOURCES, INC.

By DUDLEY H. CHAPMAN
1711 N Street, N.W.
Washington, D.C. 20036
(202) 331-8160
Counsel of Record

KEITH I. CLEARWATERS
1711 N Street, N.W.
Washington, D.C. 20036
Counsel for Petitioner

PATRICK M. MCSWEENEY
JACK W. BURTCH, JR.
MCSWEENEY, STUTTS & BURTCH
9 South 12th Street
Richmond, VA 23219
Counsel for Petitioner